RECORD AND BRIEFS

Nos. 16-285; 16-300; 16-307

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND
ERNST & YOUNG U.S., LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh, Ninth And Fifth Circuits

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENTS IN NO. 16-307

MARY-CHRISTINE SUNGAILA*
HAYNES AND BOONE, LLP
600 Anton Blvd., Suite 700
Costa Mesa, CA 92626
(949) 202-3062
MC.Sungaila
@haynesboone.com

ALEX R. STEVENS
HAYNES AND BOONE, LLP
2323 Victory Ave., Suite 700
Dallas, TX 75219
(214) 651-5475
Alex.Stevens
@haynesboone.com

Attorneys for Amicus Curiae
International Association of Defense Counsel
**Counsel of Record*

June 16, 2017

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The Seventh and Ninth Circuits Incorrectly Failed to Apply This Court's Contrary Congressional Command Test In Assessing Whether the NLRA Overcomes the Liberal Federal Policy in Favor of Arbitration Expressed in the FAA 3

II. The Unpredictability Created by the Seventh and Ninth Circuits' Decisions Will Reverberate Beyond Employment Cases 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) 1, 4, 9

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 3, 4

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 3

Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016) 5

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) 6, 7, 8, 9, 11

D.R. Horton, Inc., 357 NLRB 2277 (2012) 4, 5

D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) 5

Davis v. S. Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002) 10

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) 2

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 8, 9

Howse v. DirectTV, LLC, No. 6:16-cv-594-Orl-40TBS, 2016 U.S. Dist. LEXIS 150372 (M.D. Fla. Oct. 31, 2016) 11

Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129 (Cal. 2014) 5

Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016) 6

TABLE OF AUTHORITIES – Continued

Page

Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016) 7

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 3

Murphy Oil, U.S.A., Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), Case No. 16-307 5

NLRB v. Alt. Entm't, Inc., Nos. 16-1385, 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017) 5

Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) 5

Scherk v. Alberto-Culver Co., 94 S. Ct. 2449 (1974) 3

Shearson/Am. Express v. McMahon, 107 S. Ct. 2332 (1987) 3, 6

Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) 4

Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) (per curiam) 5

Tallman v. Eighth Judicial Dist. Court, 359 P.3d 113 (Nev. 2015) 5

United States v. Int'l Fid. Ins. Co., No. 16-0472-WS-C, 2017 U.S. Dist. LEXIS 16791 (S.D. Ala. Feb. 7, 2017) 11

Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989) 4

Walton v. Rose Mobile Homes, LLC, 298 F.3d 470 (5th Cir. 2002) 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

9 U.S.C. § 2 .....3, 6

29 U.S.C. § 157 4

29 U.S.C. § 158 9

29 U.S.C. § 158(a)(1) 4

OTHER AUTHORITIES

80 Fed. Reg. 42710 (May 21, 2015) No. P114406.....10

INTEREST OF *AMICUS CURIAE**

The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of the IADC in the benefits of arbitration is exemplified by its participation as *amicus* before this Court in several cases concerning federal arbitration law, including, inter alia, *Am. Express*

---

* No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to the filing of *amicus* briefs or have separately consented to the filing of this brief.

Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

SUMMARY OF THE ARGUMENT

In two of the three decisions below, the Seventh and Ninth Circuits became the first federal circuit courts of appeals to hold that employer-employee agreements to arbitrate employment disputes on an individual basis are impermissible restrictions on employees' rights to act in concert under the National Labor Relations Act (NLRA) and therefore unenforceable under the Federal Arbitration Act (FAA). Unlike the Fifth Circuit, which correctly concluded that the NLRA does not bar such agreements in the third decision below, the Seventh and Ninth Circuits reached the opposite conclusion by analyzing whether such agreements could be deemed unlawful under the NLRA, then looking to whether the FAA changed this result, and concluding that because such agreements could be deemed unlawful under the NLRA, they were unenforceable under the FAA's savings clause.

In this *amicus* brief, we provide additional reasons why this Court should reject the Seventh and Ninth Circuits' approach, and affirm its prior holdings that under the FAA, arbitration agreements must be enforced according to their terms unless this enforcement mandate is overridden by a contrary congressional command. We then explain that unless this Court rejects the Seventh and Ninth Circuits' attempts

to undermine the FAA and this Court's prior precedents, the unpredictability engendered by the decisions below will likely reverberate beyond the employment context, casting agreements to arbitrate other claims into doubt and further vitiating the liberal federal policy in favor of arbitration that undergirds the FAA.

ARGUMENT

I. The Seventh and Ninth Circuits Incorrectly Failed to Apply This Court's Contrary Congressional Command Test In Assessing Whether the NLRA Overcomes the Liberal Federal Policy in Favor of Arbitration Expressed in the FAA.

Congress passed the FAA in an attempt to "'reverse[e] centuries of judicial hostility to arbitration agreements,' by 'plac[ing] arbitration agreements upon the same footing as other contracts.'" *Shearson/Am. Express v. McMahon*, 107 S. Ct. 2332, 2337 (1987) (citing *Scherk v. Alberto-Culver Co.*, 94 S. Ct. 2449, 2453 (1974)). Section 2 of the FAA accomplishes this goal by declaring that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This and other provisions of the FAA thus reflect "a 'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye*

Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)). This Court has repeatedly applied this policy to hold that courts must enforce arbitration agreements according to their terms, *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Concepcion*, 563 U.S. at 339, including terms requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g., Italian Colors Rest.*, 133 at 2308-10; *Concepcion*, 563 U.S. at 352.

In contravention of this Court's precedent, however, the National Labor Relations Board (NLRB) determined in 2012 that agreements requiring individual arbitration of employment disputes unlawfully interfere with employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under NLRA Section 7. *D.R. Horton, Inc.*, 357 NLRB 2277, 2278 (2012); *see also* 29 U.S.C. § 157. The NLRB further concluded that such agreements violate NLRA Section 8(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." *Id.* at 2280; *see also* 29 U.S.C. § 158(a)(1). The NLRB accordingly ordered the employer-respondent to cease and desist from invoking a mandatory arbitration agreement with class and collective action waivers, and to rescind or revise its existing arbitration agreement to clarify that it did not constitute a waiver of the right to maintain employment-related class or collective actions. *Id.* at 2289.

The employer-respondent in *D.R. Horton* filed a petition for review in the Fifth Circuit, and the NLRB filed a cross-application for enforcement. The Fifth Circuit ultimately refused to enforce the portion of the NLRB's order invalidating the employer's arbitration agreement on the basis of its class and collective action waivers, finding the NLRB's hostility to such waivers in employee arbitration agreements to be incompatible with the FAA. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 364 (5th Cir. 2013). Despite this ruling, the NLRB continued to seek to invalidate class and collective action waivers in employee arbitration decisions, including in one of the three cases now before this Court, *see Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), Case No. 16-307.

Unconvinced by the NLRB's reasoning, the Second, Sixth, and Eighth Circuits and the Supreme Courts of California and Nevada have all joined the Fifth Circuit in rejecting the argument that the NLRA renders unenforceable agreements to resolve employment disputes in individual arbitration. *See NLRB v. Alt. Entm't, Inc.*, No. 16-1385, 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 149-150 (Cal. 2014); *Tallman v. Eighth Judicial Dist. Court*, 359 P.3d 113, 122-123 (Nev. 2015). The Seventh and Ninth Circuits, on the other hand, in the other two

cases before this Court, have reached the opposite conclusion, siding with the NLRB in determining that arbitration agreements with class or collective action waivers were unenforceable under the NLRA. Both decisions relied on the FAA's savings clause, which creates an exception to the FAA's presumption of enforceability "upon such grounds as exist at law or in equity for the revocation of any contract" 9 U.S.C. § 2, and both decisions ignored this Court's pronouncement that arbitration agreements must be enforced according to their terms "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citing *Shearson/Am. Express v. McMahon*, 107 S. Ct. 2332, 2337 (1987)).

In particular, the Seventh Circuit concluded that performing the contrary congressional command analysis required by this Court in *CompuCredit* and earlier cases would "put[] the cart before the horse" and instead began its analysis with the NLRA, and determining that the "concerted activities" protected by NLRA Section 7 included "filing a collective or class action suit." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1156 (7th Cir. 2016). The court then concluded that because "the provision at issue is unlawful under Section 7," it "meets the criteria of the FAA's savings clause for non-enforcement." *Id.* at 1157. Similarly, the Ninth Circuit concluded that NLRA Section 7 creates a "substantive right" to the collective pursuit of "work-related legal

claims" and that an employment arbitration agreement with a class or collective action waiver "interferes with" concerted legal action, and "cannot be enforced." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980-984 (9th Cir. 2016). Like the Seventh Circuit, the Ninth Circuit relied on the FAA's savings clause to conclude that the FAA "does not dictate a contrary result." *Id.* at 984.

Had the Seventh and Ninth Circuits correctly applied *CompuCredit*'s rule requiring a contrary congressional command to override the FAA's mandate that arbitration agreements be enforced according to their terms, there can be no doubt that the arbitration agreements at issue would be enforceable. The NLRA lacks a "contrary congressional command" that could suffice to override the FAA, and NLRA Sections 7 and 8 not only fail to discuss arbitration, but also fail to discuss any employee rights to pursue litigation. Although employment-related litigation *may* constitute protected activity under Section 7, this possibility does not permit courts to elevate the NLRA over the clear congressional policy preference in favor of arbitration expressed in the FAA. The Court should accordingly reject the Seventh and Ninth Circuits' reversal of its holding in *CompuCredit* and reaffirm the FAA's requirement that arbitration agreements be enforced according to their terms unless Congress clearly expresses a command to the contrary.

The Seventh and the Ninth Circuits were wrong to invert *CompuCredit*'s analytical framework by beginning with another statute – in this case the NLRA

– and concluding that because the right to concerted activity under the NLRA could include group litigation in some circumstances, a waiver of the right to arbitrate employment claims as a group was unlawful and therefore unenforceable under the FAA's savings clause. In so holding, both courts rendered *CompuCredit* a nullity and relegated the FAA to a second-class statute, while introducing considerable uncertainty into the enforcement of arbitration agreements that may be in tension with other federal statutes. This Court should reverse these decisions and restore the contrary congressional command test.

II. The Unpredictability Created by the Seventh and Ninth Circuits' Decisions Will Reverberate Beyond Employment Cases.

This Court's requirement that courts enforce arbitration agreements according to their terms unless a contrary congressional command requires otherwise builds on the reasonable principle, expressed by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26. This approach fosters predictability regarding the enforcement of arbitration agreements because "if such an intention exists, it will be discoverable in the text of the [federal statute], its legislative history, or an 'inherent conflict' between arbitration

and the [federal statute's] underlying purposes." *Id.* In other words, for another federal statute to trump the FAA's instructions that arbitration agreements must be enforced according to their terms, that statute must itself express a "contrary congressional command." *CompuCredit*, 132 S. Ct. at 669.

Neither Section 7 nor Section 8 of the NLRA mentions arbitration or any other right of employees to pursue legal action, either individually or as part of a group. *See* 29 U.S.C. §§ 157-158. When faced with federal statutes that are similarly silent regarding arbitration, this Court has consistently declined to infer an attempt to defeat the FAA's enforcement mandate. *See, e.g., Italian Colors Rest.*, 133 S. Ct. at 2309 (2013) (enforcing arbitration agreement in antitrust context and noting that "[t]he Sherman and Clayton Acts make no mention of class actions"); *CompuCredit*, 132 S. Ct. at 669. Similarly, this Court will not infer an intent to preclude individual arbitration agreements from statutory language that expressly authorizes class or collective actions. For example, in *Gilmer*, the Court noted that the Age Discrimination in Employment Act expressly "provid[ed] for the possibility of bringing a collective action," but cautioned that this express authorization "does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32. Rather, the Court found that the ADEA offered a "flexible approach to resolution of claims" which did not exclude the possibility of individual arbitrations. *Id.* at 29-31.

In endorsing the NLRB's attempt to upend this and the Court's other FAA jurisprudence, the Seventh and Ninth Circuits have opened up the FAA's savings clause to any manner of "illegality" defenses gleaned from other statutes that might be used to render arbitration agreements unenforceable. Nothing in this reasoning limits it to employment agreements and the NLRA – which means it could threaten arbitration agreements in a wide range of contexts. For example, the Federal Trade Commission (FTC) recently affirmed its position that the Magnuson-Moss Warranty Act (MMWA) prohibits mandatory binding arbitration in some consumer warranty disputes, even though the MMWA contains no contrary congressional command to override the FAA nor does it directly address binding arbitration or discuss the FAA. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen In the 2015 Magnuson-Moss Warranty Act Review, Project No. P114406, 80 Fed. Reg. 42710 (May 21, 2015). Although no federal court of appeals has endorsed this position, and two have rejected it, *see Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), the approach endorsed by Seventh and Ninth Circuits would encourage agencies like the FTC to carve out exceptions to the FAA through administrative rulemaking, which could then be used by Courts to preclude enforcement of the FAA through the Seventh and Ninth Circuits' interpretation of the FAA's savings clause.

The reasoning of the Seventh and Ninth Circuits' decisions would also provide a strong incentive for parties to offer strained readings of statutes to create "illegality" defenses to arbitration, despite the absence of a clear congressional command in the statute at issue. Currently, such challenges are easily – and correctly – dispensed with in light of *CompuCredit*'s insistence on a contrary congressional command to override the FAA. *See, e.g.*, *United States v. Int'l Fid. Ins. Co.*, No. 16-0472-WS-C, 2017 U.S. Dist. LEXIS 16791 (S.D. Ala. Feb. 7, 2017) (rejecting argument that Miller Act precludes arbitration of contractor disputes); *Howse v. DirectTV, LLC*, No. 6:16-cv-594-Orl-40TBS, 2016 U.S. Dist. LEXIS 150372 (M.D. Fla. Oct. 31, 2016) (rejecting argument that Electronic Funds Transfer Act evinces congressional intent to preclude arbitration). But these and other disputes would face considerable uncertainty if the Seventh and Ninth Circuits' rejection of *CompuCredit*'s bright-line rule remains in place.

CONCLUSION

For the foregoing reasons and for those expressed in Petitioners' merits brief in case numbers 16-285 and 16-300, and Respondent Murphy Oil's brief in case number 16-307, the decisions of the Seventh and Ninth Circuit should be reversed and that of the Fifth Circuit affirmed.

Respectfully submitted,

MARY-CHRISTINE SUNGAILA
Counsel of Record
HAYNES AND BOONE, LLP
600 Anton Blvd., Suite 700
Costa Mesa, CA 92626
(949) 202-3062
MC.Sungaila@haynesboone.com

ALEX R. STEVENS
HAYNES AND BOONE, LLP
2323 Victory Ave., Suite 700
Dallas, TX 75219
(214) 651-5475
Alex.Stevens@haynesboone.com

Counsel for Amicus Curiae International Association of Defense Counsel